STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS AND
THE CIRCUIT COURT FOR THE COUNTY OF WAYNE)

CHERYCE GREENE, as Personal Representative of the Estate of KEIMER EASLEY, deceased,

Plaintiff-Appellee,

v

A.P. PRODUCTS LIMITED, and
REVLON CONSUMERS PRODUCTS CORPORATION,

Defendants-Appellants (in docket no. 127718),

-AND-

SUPER 7 BEAUTY SUPPLY, INC.,

Defendant-Appellant (in docket no. 127734).

Supreme Court Nos. 127718 and 127734

C.A. No. 249113

L.C. No. 01-125094-NP

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BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS A.P. PRODUCTS LIMITED AND REVLON CONSUMERS PRODUCTS CORPORATION

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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INTRODUCTION

A.P. Products, Ltd. and Revlon Consumers Products Corporation contend that this Court should reverse the November 23, 2004 decision of the Court of Appeals[1] because it is completely at odds with this Court's decision in *Glittenberg v Doughboy Recreational Indust*, 441 Mich 379; 491 NW2d 208 (1992) and is inconsistent with the subsequent Court of Appeals decision of *Mallard v Hoffinger Indust, Inc*, 210 Mich App 282; 533 NW2d 1 (1995) (on rem'd) 222 Mich App 137; 564 NW2d 74 (1997).[2] In *Glittenberg*, this Court stated and in *Mallard*, the Court of Appeals applied, the rule that the fact that persons in general, and a plaintiff in particular, may not appreciate the degree of danger of potential injury associated with the use (and this case involves the misuse) of a product does not translate into a duty to warn when the basic danger is either obvious or already known.

The Court of Appeals in this case utterly failed to follow this rule and instead, applied pre-*Glittenberg* and pre-1992 cases which had held that:

> "Even if a reasonable person would be conscious of possible harm or of a vague danger associated with the product, it does not 'preclude a jury from finding that a warning was nonetheless required to give [the purchaser] a full appreciation of the seriousness of the life-threatening risks involved.'"

Apx, pp 44-45.

The holding of the Court of Appeals in this case is identical to the holding of the Court of Appeals in *Horen v Coleco Indust*, 169 Mich App 725; 426 NW2d 794 (1988) -- which was one of the three consolidated cases decided by this Court in *Glittenberg, supra*.

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[1] *Greene v AP Products, Ltd.*, 264 Mich App 391; 691 NW2d 38 (2004).

[2] It is also inconsistent with the premises liability case of *Stopczynski v Woodcox*, 258 Mich App 226; 671 NW2d 119 (2003).

In *Horen, supra*, the Court of Appeals had held:

> "Even should the evidence establish [plaintiff's] consciousness of a vague danger, this would not preclude a jury from finding that a warning was nonetheless required to give full appreciation of the life-threatening risks involved."

169 Mich App at 731.

That very holding was rejected and the *Horen* decision was reversed by this Court in *Glittenberg*! The Plaintiffs in the three consolidated cases in *Glittenberg* argued that while they, and average users of ordinary intelligence, knew of a general risk of injury associated with the use of the product, they, and average users of ordinary intelligence, did not perceive the risk of quadriplegic injury or death[3] and, therefore, the manufacturer owed a duty to warn of the specific, severe consequences. The argument was rejected. This Court stated:

> "The gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized.
>
> * * *
>
> In effect, plaintiffs seek to convert the duty to warn argument by conceding a readily apparent and generally recognized dangerous condition for which no duty exists, while claiming that because a specific consequence or degree of harm from that dangerous condition, i.e., paralysis or death, is not generally recognized, a specific warning is required.
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> * * *
>
> . . . [W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur

[3] *Glittenberg, supra* at p 400, fn 28.

> from the use or foreseeable misuse of the product. As the court observed in *Jamieson, supra* at 39:
>
> > [S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one . . . ."

Glittenberg, supra at pp 401-402. (Underlining supplied.)

In this case, the Court of Appeals acknowledged that:

> ". . . Most individuals understand that ingestion of these ingredients, as contained in a hair and body care product, may make them ill and possibly result in vomiting, diarrhea, and maybe having their stomach pumped . . . ."

Apx, p 44. Thus, the Court of Appeals has acknowledged that the risk of harm from ingesting the subject product is open and obvious. As a consequence, there is no duty to warn based on this Court's holding in *Glittenberg*. Yet, the Court of Appeals has said that there is.

For this reason, primarily, this Court should reverse the November 23, 2004 decision of the Court of Appeals and reinstate the grant of summary disposition in favor of Defendants-Appellees. Additional reasons support the same request for relief. Those reasons will be set forth in this Brief.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* a trial court's ruling on a motion for summary disposition. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 159; 645 NW2d 643 (2002); *Spiek v Department of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

As noted in *Jamieson v Woodward & Lothrop*, 101 App DC 32; 247 F2d 23, 33 (5th Cir 1957), *cert denied* 355 US 855; 78 S Ct 84; 2 L Ed 2d 63 (1957), summary disposition is particularly appropriate if it is established that the defendant has violated no legal obligation:

> "We must, when appropriate procedural demands have been made, determine at the outset of an action whether a possible liability in law of the defendant has been indicated by the plaintiff. This is a concept basic in our jurisprudence. It is established, firmly and correctly, that if a defendant has violated no legal obligation, his liability for pecuniary damages must not be submitted to the possible prejudices, sympathies or whims of a lay jury. His basic liability is first to be tested as a matter of law by the judge. . . . If there is no possible liability in law, and no genuine issue of material fact exists, the established practice is summary judgment."

STATEMENT OF FACTS

A. Introduction.

Sometime in the spring of 1999, Plaintiff Cheryce Greene purchased a bottle of the subject product, African Pride Ginseng Miracle Wonder 8 Oil Hair and Body Mist Captivate, at Pro Care Beauty Supply, which she frequented every two to three weeks for the purpose of buying perm and nail supplies **(Dep of Cheryce Greene, pp 78-80; Apx, p 71).** Ms. Greene is a certified nail technician, having successfully completed courses and testing in nail technology and nail care products, and operated her own business **(Dep of Cheryce Greene, pp 85-86; Apx, p 73).** Moreover, Ms. Greene is a certified nursing assistant who became certified in 1997. **(Dep of Cheryce Greene, pp 41-42; Apx, p 62).** For many years prior to this, Ms. Greene had used an African-American hair-moisturizing product called Iso Plus Oil Sheen. On this occasion she saw the subject product displayed as a comparable new product and decided to give it a try **(Dep of Cheryce Greene, pp 80-84; Apx, pp 71-72).** She testified that she read the ingredients on the label, some of which she was familiar with and some which were unknown to her **(Dep of Cheryce Greene, pp 84-85; Apx, p 72-73).** She had never heard of the product before and had never seen it advertised **(Dep of Cheryce Greene, pp 81, 90; Apx, pp 72,74).**

Ms. Greene took the product home with her and used it approximately every other day **(Dep of Cheryce Greene, p 91; Apx, p 74).** She was generally satisfied with the product, although she found it to be "a little oily" **(Dep of Cheryce Greene, pp 95-96; Apx, p 75).**

Ms. Greene testified that she kept the product in the medicine cabinet located above the sink in her bathroom at home. It was always kept in that cabinet whenever she wasn't using it **(Dep of Cheryce Greene, pp 97, 108, 148; Apx, pp 76, 78, 88).** Ms. Greene testified that this

was not a product that she would have left out for her son to get at or let him taste it because she was afraid it could be harmful to him. **(Dep of Cheryce Green, p 121; Apx, p 82).**

On June 28, 1999, Ms. Greene returned home from work at approximately 9:15 a.m. **(Dep of Cheryce Greene, p 98; Apx, p 76).** While she was at work, her 11-month-old son, Keimer Easley, was being watched by her 13-year-old niece, Nicole Price **(Exhibit A, Dep of Cheryce Greene, p 38; Apx, p 61).** When she returned from work that evening, no one but Nicole and Keimer were there, and no one else had been in the house while she was away **(Dep of Cheryce Greene, p 103; Apx, p 77; Dep of Nicole Price, p 13; Apx, p 98)**. They were sitting on the front porch waiting for Ms. Greene. They spent two or three minutes talking on the porch before going inside. Ms. Greene testified that she put Keimer in his playpen in the living room, and told Nicole to leave him in there while she went upstairs to her bedroom to program a new television she had recently purchased **(Dep of Cheryce Greene, pp 105-106; Apx, p 78).** For the next five to ten minutes, Ms. Greene was seated on her bed in her room, with her back to the door, while she used the remote control to program the television **(Dep of Cheryce Greene, pp 106-107; Apx, p 78).**

Suddenly, Ms. Greene heard Keimer coughing behind her **(Dep of Cheryce Greene, p 110; Apx, p 79).** She turned around and saw him standing up against a nightstand by her door, holding the product bottle, with the oil around and in his mouth **(Dep of Cheryce Greene, pp 105-106, 110, 113; Apx, pp 78, 79, 80).** She quickly hopped over the edge of the bed and

knocked the bottle out of his hand, sending it flying **(Dep of Cheryce Greene, p 113; Apx, p 80).**[4]

Ms. Greene testified that Keimer was coughing and she gave him some milk, because that is what you give a child who ingests a product that is poisonous, then called 911 **(Dep of Cheryce Greene, p 122; Apx, p 82).** Later, she decided to drive Keimer to the Grace Hospital herself **(Dep of Cheryce Greene, pp 123-124; Apx, p 82).** After he was stabilized, he was transferred to Children's Hospital a few hours later **(Dep of Cheryce Greene, p 127; Apx, p 83).** Upon admission to Children's Hospital, he was diagnosed with chemical pneumonitis secondary to hydrocarbon (mineral oil) ingestion. Keimer's condition improved over the first couple of weeks that he was in the hospital, but he ultimately began to develop recurrent pneumothoraces and passed away on July 30, 1999.

The subject product is packaged in a clear, plastic, 7.5-ounce bottle, with a threaded plastic cap incorporating a pump actuator, covered by a snap-on clear plastic cover **(Photos of exemplar; Apx, pp 109-110).** The actual product has not been seen since the date of the incident, when family members brought it to Ms. Greene at the hospital. Ms. Greene testified that, at that time, the snap-on clear plastic cover and the pump actuator were missing, and the threaded plastic cap was cracked vertically, such that it could be peeled off of the top of the bottle **(Dep of Cheryce Greene, pp 117-118; Apx, p 81).** She does not know whether this damage was caused when she knocked the bottle out of Keimer's hands, or if this was the

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[4] Ms. Greene testified that Nicole later told her that she had brought Keimer upstairs to Ms. Greene's bedroom because she was going to go back outside on the front porch, and that she just assumed that Ms. Greene had heard her bring the child into the room **(Dep of Cheryce Greene, p 107; Apx, p 78).** Nicole testified that she brought Keimer into Ms. Greene's room, left him standing against the edge of the bed and told Ms. Greene that she was going to go sit on the front porch. She thought she said it loud enough for Ms. Greene to hear her **(Dep of Nicole Price, pp 19, 22-23; Apx, pp 100-101).**

condition of the bottle when she turned around to find Keimer holding it **(Dep of Cheryce Greene, pp 116-119, 140-141; Apx, pp 80-81, 86-87).** She did testify, however, that she knows with certainty that the bottle was undamaged and still had the pump actuator and clear plastic cover when she last used the product earlier that same day **(Dep of Cheryce Greene, pp 118-119; Apx, p 81).** Whenever Ms. Greene would use the product, she would replace the clear plastic cover over the pump actuator, and put it back in the medicine cabinet **(Dep of Cheryce Greene, p 116; Apx, p 80).** Ms. Greene is at a loss to explain how 11-month-old Keimer would have been able to get the oil out of the bottle **(Dep of Cheryce Greene, p 116; Apx, p 80).** She does not know if he would have had the requisite dexterity to manipulate the pump actuator; he had never encountered any spray bottles in his life **(Dep of Cheryce Greene, pp 119-120; Apx, p 81).** Nicole testified that she did not believe he would have been able to work the pump actuator **(Dep of Nicole Price, p 49; Apx, p 107).**

When asked how Keimer could have possibly gotten his hands on the product when it was always kept in the medicine cabinet above the sink in the bathroom across the hall from her bedroom, Ms. Greene had no explanation.

> "Q How was it that he was able to get the product out of the medicine cabinet in the bathroom?
>
> A He couldn't have got it out of there. It had to be already in my room. I don't know. Maybe my niece might have used it and left in there. I don't know.
>
> Q Because you indicated that when you weren't using it, you always kept it in the medicine cabinet.
>
> A I kept it in the medicine cabinet.
>
> Q You know that you didn't leave it out in your bedroom; right?
>
> A Correct.

Q Okay. Did Nicole have your permission to use – to use your beauty products?

A Yes.

Q Would she have had your permission to use – take the product out of the bathroom and leave it in your bedroom?

A No.

Q Why not?

A She knows where I keeps all my products at.

Q Did you ever ask her why she would have removed it from the bathroom medicine cabinet and left it in your bedroom?

A No. I never asked her.

Q And she never told you why?

A No.

Q In fact, do you know that that's how it got there?

A I'm not sure if she –

Q -- I'm sorry. You said she must have done it, but I don't know if you said that because you know you didn't and that's the only other possibility.

A Right. I'm not sure if she did or didn't, but I know she uses my products. And the last time I used it that day, I had it in the cabinet.

Q Was – and you had used it that day?

A Yeah."

(Dep of Cheryce Greene, pp 108-109; Apx, pp 78-79). (Underlining supplied).

"Q So if I understand you correctly, you have no idea where he grabbed this product from; is that true?

A That's true.

Q You just know it wasn't in the bathroom cabinet because there's no way he could have gotten it from there; right?

A Right."

(Dep of Cheryce Greene, p 112; Apx, p 79).

Most significantly, for the present purposes, Ms. Greene testified that she would not have left a product like this out where Keimer could get to it, and she would have never allowed him to put it in his mouth. She knew that it was a product that should not be ingested **(Dep of Cheryce Green, p 114; Apx, p 80)** because she would be afraid that it could be harmful to him **(Dep of Cheryce Greene, pp 121-122; Apx, p 82).** She testified that this was not a product that she would have left out for her infant son to get at **(Dep of Cheryce Green, p 121; Apx, p 82).**[5] Her knowledge of such a potential danger is further evidenced by her reaction when she saw Keimer with the product; in addition to lunging over the bed to knock the product from his hands, she immediately started screaming **(Dep of Cheryce Greene, pp 122-123; Apx, p 82).** She had long exercised the same caution, for the same reasons, with the nail care products that she kept around the house **(Dep of Cheryce Greene, pp 137-139; Apx, p 86).** She testified that she kept those products away from her children because she knew that they could be harmful if swallowed **(Dep of Cheryce Green, p 139; Apx, p 86).** Ms. Greene believes that the nightstand in her bedroom was the only surface that was reachable for Keimer, but she had never seen the

[5] To be complete it must be noted that Ms. Green subsequently stated that she would never have thought that the product would be dangerous **(Dep of Cheryce Green, p 121; Apx, p 82).** If that was truly so, why then would she have taken the steps which she did to ensure that her infant son not have access to the product? And, why did she give him milk, which she testified is what you give a child who ingests a product that is poisonous, if she didn't think it was dangerous? Even the Court of Appeals acknowledged that ". . . Plaintiff realized that some level of non-lethal harm could be associated with the ingestion of the Wonder 8 Oil . . . ." **Apx, p 45.**

product there and she would have never left it there with young children around **(Dep of Cheryce Greene, pp 141-142; Apx, p 87).**

Nicole's testimony did nothing to solve the mystery of how Keimer could have gotten access to the product. She testified that she only saw the product twice before the incident; about one week prior to the incident, she saw Ms. Greene use it, and a couple of days before the incident, she used it herself. On both occasions, the product never left the bathroom. She never saw the product again **(Dep of Nicole Price, pp 31-35; Apx, pp 103-104).** Like Ms. Greene, Nicole has no idea how Keimer got his hands on the product, because it would have been impossible for him to access the medicine cabinet **(Dep of Nicole Price, pp 35-36; Apx, p 104).** Ms. Greene later told her that the bottle had been on the nightstand in her bedroom when Keimer got to it, but she did not indicate how it might have ended up there and Nicole had no ideas in that regard **(Dep of Nicole Price, p 36; Apx, p 104).** The most important part of her testimony was that even she, a 13-year old, knew that such a product needs to be kept away from an infant like Keimer, "[b]ecause it's oil, and I know he's not supposed to drink oil," because it could hurt him **(Dep of Nicole Price, p 38; Apx, p 105).**

While Ms. Greene believes that the subject product was responsible for the death of her son, she admitted that she does not know what the Defendants could have done or should have done differently that might have prevented the tragedy **(Dep of Cheryce Greene, p 153; Apx, p 90).**

B. Circuit Court Proceedings.

Based on the foregoing facts disclosed during discovery, all Defendants filed Motions for Summary Disposition. Defendants-Appellants asserted that summary disposition was mandated because (1) the fact that Ms. Greene did not appreciate the degree of potential injury does not translate into a duty to warn because the basic danger was obvious to average users of ordinary

intelligence and was already known to her and (2) there was no evidence that would support a claim that a lack of warnings on the product or the absence of "child-proof" packaging was a proximate cause of the incident and (3) the product was misused in a manner that was not reasonably foreseeable. Tr., 5/21/03; **Apx, pp 25-35**. In opposition to the request for summary disposition, Plaintiff filed a Response and with that Response tendered the post-deposition affidavit of Ms. Green. In her Response, Plaintiff argued that while she knew not to permit her child to ingest the product because of the potential harm to him, the Defendants had a duty to provide a warning regarding the toxicity and potential lethal consequences of ingesting the product. In her Affidavit she asserted in substance – and contrary to the testimony which she gave at her deposition – that she did not know that the subject product was dangerous and that had she known she would have locked it up and not let her niece have access to it. (Affidavit of Cheryce Greene, dated May 16, 2003, ¶¶4-5; **Apx, p 112**; *see also* Tr, 05/21/03, p 17).[6] ; **Apx, p 31.** Oral arguments on the Defendants' Motions for Summary Disposition were heard on May 21, 2003. At the conclusion of the arguments, Wayne County Circuit Court Judge Kaye Tertzag granted the Defendants' Motions for Summary Disposition adopting the briefs and oral arguments of the Defendants as the bases for his decisions. (Tr, 05/21/03, pp 11, 21) ; **Apx, pp 25, 35**.

The Order granting Defendants' Motions for Summary Disposition was entered on May 21, 2003. Plaintiff's Claim of Appeal followed on June 10, 2003.

[6] The inadmissibility of an affidavit to contradict deposition testimony in an attempt to stave off summary disposition is discussed *infra.*

C. The Court of Appeals Decision.

On November 23, 2004, the Court of Appeals issued its decision in this matter. The Court of Appeals first addressed, and rejected, Defendants-Appellants' argument that the objective open and obvious danger doctrine and the subjective known-to-the-user doctrine both applied and obviated the claimed duty to warn of the degree of harm that may result from ingestion of the product. The Court of Appeals acknowledged that:

> ". . . [T]he risk of possibly becoming ill associated with the ingestion of the hair and body care product would probably be obvious to a reasonably prudent product user and would likely be a matter of common knowledge to persons in the same or similar position as plaintiff."

The Court of Appeals held:

> "While most individuals understand that ingestion of these ingredients, as contained in a hair and body care product, may make them ill and possibly result in vomiting, diarrhea, and maybe having their stomach pumped, reasonable minds could differ on whether knowledge of the ingredients alone, without any warning whatsoever of harm or danger, would alert one to the fact that death could result from ingesting the product.
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> * * *
>
> Even if a reasonable person would be conscious of possible harm or of a vague danger associated with the product, it does not "preclude a jury from finding that a warning was nonetheless required to give [the purchaser] a full appreciation of the seriousness of the life-threatening risks involved." *Michigan Mut Ins Co v Heatilator Fireplace,* 422 Mich App 285, 293; 451 NW2d 603 (1990), aff'd in *Glittenberg, supra*; *Pettis v Nalco Chem Co,* 150 Mich App 294, 302-303; 388 NW2d 343 (1986); *Graham v Ryerson*, 96 Mich App 480, 489; 292 NW2d 704 (1980), disagreed with on other grounds in *Bradbury v Ford Motor Co,* 419 Mich 550; 358 NW2d 550 (1984).

Apx, p 44-45.

The Court of Appeals then addressed and decided the "closely-related issue"[7] regarding the existence of a duty to warn of specific consequences when a Plaintiff testified that she has knowledge of the basic danger associated with the use of the product. The Court of Appeals held that despite the fact that:

> ". . . [P]laintiff realized that some level of non-lethal harm could be associated with the ingestion of the Wonder 8 Oil, ..." **; Apx, p 45.**

the Defendants-Appellants nonetheless had a duty to warn of the potential lethal or fatal qualities of the product should one of her children accidentally ingest the product. **Apx, p 45.**

The Court of Appeals next determined that Plaintiff had established a factual issue with respect to whether Defendants' breach of the claimed duty to warn was a proximate cause of the incident. **Apx, p 46.** Despite acknowledging that Plaintiff cannot explain how the infant gained possession of the product and that Plaintiff "speculated" that her niece used the product and left it in the bedroom, the Court of Appeals held that Plaintiff's post-deposition Affidavit, in which she averred that she would not have allowed her niece to use the product and would not have left it in the medicine cabinet, was sufficient to create a factual issue regarding causation. The Court of Appeals reached this conclusion despite the fact that the niece herself had testified that she would not have let the infant have the product because it was oil and she knew that the infant was not supposed to drink oil because it could hurt him. **Dep of Nicole Price, p 38; Apx, p 105.**

Lastly, the Court of Appeals rejected the Defendants' argument that the trial court had properly granted summary disposition because ingestion of the subject product was clearly an unforeseeable misuse of the product. **Apx, p 48.** The Court of Appeals acknowledged that the

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[7] To this limited extent, the Court of Appeals was correct when it stated that the ". . . the issue whether the danger was open and obvious ties so closely with matters regarding knowledge . . . ." **Apx, p 43.**

Wonder 8 Oil was misused because it was not intended for ingestion. **Apx, p 48**. The Court of Appeals, however, held that whether or not the conceded misuse by an infant[8] was reasonably foreseeable was a function of the extent of objective and subjective knowledge concerning the danger associated with ingesting it.

D. The Grant of Leave.

On January 3, 2005, Defendants-Appellants filed their Application for Leave to Appeal in this Court. On October 19, 2005, this Court entered its Order granting Defendants-Appellants' Application for Leave to Appeal stating:

> "On order of the Court, the application for leave to appeal the November 23, 2004 judgment of the Court of Appeals is considered, and it is GRANTED. Among the issues to be briefed, the parties are specifically directed to address the following: (1) whether the Court of Appeals erred in using a subjective rather than an objective standard in its analysis of the open and obvious doctrine, (2) whether the Court of Appeals erred in concluding that the product at issue was not a 'simple' product, (3) whether the Court of Appeals erred in failing to recognize plaintiff as a sophisticated user as defined by MCL 600.2945(j), and (4) whether aspiration of this product is a foreseeable misuse, and whether the material risk of the misuse is or should be obvious to a reasonably prudent product user."

Greene v A.P. Products, Ltd, 474 Mich 886; 704 NW2d 702 (2005); **Apx, p 51**..

[8] The Court of Appeals held that ingestion of the product by an adult was not reasonably foreseeable apparently because the danger of ingesting it was open and obvious to adults. If the danger of ingesting the product was, as the Court of Appeals said, open and obvious so as to render ingestion by an adult not reasonably foreseeable, then it must have been open and obvious for the purpose of eliminating the manufacturer's duty to warn. Analytical consistency compels this conclusion.

ARGUMENT I

AS A MATTER OF LAW, DEFENDANTS-APPELLANTS OWED NO DUTY TO WARN PLAINTIFF THAT SERIOUS INJURIES COULD RESULT FROM PERMITTING HER INFANT TO INGEST THE SUBJECT HAIR CARE OIL BECAUSE AVERAGE USERS OF ORDINARY INTELLIGENCE ARE AWARE OF A GENERAL RISK OF INJURY IF THE PRODUCT IS INGESTED. WHERE, AS HERE, THE RISK OF HARM IS OPEN AND OBVIOUS, THE LAW DOES NOT IMPOSE UPON A MANUFACTURER A DUTY TO WARN OF ALL CONCEIVABLE INJURIES THAT MIGHT OCCUR FROM THE USE OF THE PRODUCT.

A. Overview.

This is a tragic case. "However, neither negligence nor product liability jurisprudence establishes the legal principle that every injury warrants a legal remedy." *Glittenberg v Doughboy Recreational Indust, supra* at p 403.

B. Products Liability Generally.

An assessment of Plaintiff's products liability claim must begin with an acknowledgment of certain basic premises. First, accidents do happen and a defendant does not owe a duty to prevent every accident from happening. *Glittenberg v Doughboy Recreational Indust, Inc, supra*. Secondly, manufacturers and sellers are not insurers that in every instance and under all circumstances no injury will result from the use of their products. *Owens v Allis-Chalmers Corp,* 414 Mich 413; 326 NW2d 372 (1982), quoting *EI Dupont de Nemours & Co v Baridon,* 73 F2d 26 (CA 8, 1934). In other words, while courts have accepted the social policy rationale that those injured by defective products should be compensated for their injuries without being subject to the contractual intricacies of the law of sales, and have agreed that manufacturers and

sellers[9] can most effectively distribute the costs of injuries, they have never gone so far as to make manufacturers and sellers insurers of their products and, thus, absolutely liable for any and all injuries sustained from the use of those products. *Prentis v Yale Mfg Co,* 421 Mich 670, 682-683; 365 NW2d 176 (1984).

C. Products Liability - Duty to Warn.

The duty to warn against unknown dangers has been recognized as a source of tort liability. The contrary, however, is also true. No one needs to be told what is already known. *District of Columbia v Moulton*, 182 US 576, 581; 21 S Ct 840; 45 L Ed 1237 (1901).

These basic premises coalesce in the principle that a manufacturer has no duty to warn or protect typical consumers from obvious dangers presented by simple products. MCL 600.2948(2); *Fisher v Johnson Milk Co, Inc,* 383 Mich 158; 174 NW2d 752 (1970); *Owens v Allis Chalmers Corp, supra*; *Glittenberg v Doughboy Recreational Indus, Inc, (On Rehearing), supra*; *Mallard v Hoffinger Indus, Inc, (On Remand),* 222 Mich App 137; 564 NW2d 74 (1997); *Adams v Perry Furniture Co, (On Remand),* 198 Mich App 1; 497 NW2d 514 (1993), *lv denied* 445 Mich 901 (1994); *Kirk v Hanes Corp of North Carolina,* 16 F3d 705 (CA 6, 1994). The rationale underlying this rule is that given the obvious nature of the danger, the risks associated with the use of simple products are, as a matter of law, not unreasonable. An obvious danger associated with the use of a simple product is no danger to a reasonably careful person. *Glittenberg, supra* at p 396, citing *Pomer v Schoolman*, 873 F2d 1262 (7th Cir 1989).

Because the very purpose of a warning is to apprise someone of a danger of which he or she is not aware, so that he or she may protect himself or herself against it, there is no duty to

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[9] The liability of product sellers for product defects changed in 1996 with the enactment of MCLA 600.2947(6). See the Brief of Defendant-Appellant, Super 7 Beauty Supply, Inc. for a full discussion of this change.

warn where the danger is obvious. Simply put, when a dangerous condition is obvious and generally appreciated nothing of value is added by a warning. The law does not go so far, nor should it, to require a manufacturer to reinforce common knowledge.

In *Glittenberg v Doughboy Recreational Indust, supra* this Court explained that the determination of the "obvious" nature of a danger is dependent on an objective standard, not a subjective one. This Court explained:

> "Determination of the 'obvious' character of a product-connected danger is objective. The focus is the typical user's perception and knowledge and whether the relevant condition or feature that creates the danger associated with the use is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user and consumer." 441 Mich at pp 391-392.

The "ordinary user and consumer" standard applies. The open and obvious danger doctrine is not dependent on the subjective knowledge of a particular user. Simply put, because the test is objective, the court looks not to whether the Plaintiff knew of the product-connected danger but to whether an ordinary user in his or her position would have been aware of that danger.[10]

This legal principle was codified by the Legislature when it enacted MCL 600.2948(2) which provides:

> A defendant is not liable for a failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to

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[10] The open and obvious danger doctrine focuses on dangers which are obvious to ordinary persons and applies an objective standard. Application of a similar, and related, doctrine also compels the conclusion that Defendants' Motion for Summary Disposition was properly granted. Even when a claimed danger is not open and obvious to ordinary persons, there is nonetheless no duty to warn where the claimed danger is known to the person who would have received the warning. *Vroman v Sears Roebuck and Co,* 387 F2d 732 (CA 6 1987); *Bullock v Gulf and Western Mfg, Inc,* 121 Mich App 397; 328 NW2d 643 (1982). See the discussion in this regard, *infra*, where the legal significance of Ms. Greene's own, subjective, actual knowledge is analyzed.

> persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

There is no dispute as to the controlling law on this point. Plaintiff-Appellee conceded in her Brief in Opposition to these Defendants' Application for Leave to Appeal that:

> "A determination as to what is open and obvious is made on an objective basis and is not based on the Plaintiff's subjective knowledge."

To the extent that the Court of Appeals utilized a subjective, rather than an objective, standard in its analysis of the open and obvious danger doctrine, it erred as a matter of law.

1. Hair Oil is a Simple Product.

The Court of Appeals stated that a hair and body care product is, in a general sense, a simple product but ". . . cannot be considered simple when considering the numerous ingredients and compounds that are used to make the product." **Apx, p 44**.. The Court of Appeals conflated the distinct issues of (1) whether the product is a simple one and (2) whether the product-connected danger is obvious. That error led to the erroneous conclusion that the hair care product at issue in this case is not a simple product.

In *Glittenberg, supra,* this Court stated that a simple product is a product all of whose essential characteristics and functions are fully apparent or easily discernible on casual inspection, *Glittenberg, supra* at pp 385-399. In subsequent cases, the Court of Appeals and the federal courts have both contributed case law to clarify the status of the simple product doctrine.

In *Viscogliosi v Montgomery Elevator Co,* 208 Mich App 188, 189; 526 NW2d 599 (1994), the Court of Appeals adopted the two alternative tests set forth in *Raines v Colt Industries, Inc,* 757 F Supp 819 (ED Mich 1991) for determining whether a tool is simple. Products are characterized as simple when one or both of the following conditions exists: (1) the products are not highly mechanized, thus allowing the users to maintain control over the

products, and (2) the intended use of the products does not place users in obviously dangerous positions. *Id.*, at 825. Courts have found that hammers, knives, gas stoves, axes, buzz saws, propeller driven airplanes, trampolines, and guns are simple products that differ from complex products in their simplistic operation and/or design. *Treadway v Smith & Wesson Corp,* 950 F Supp 1326 (ED Mich 1996); *Adams v Perry Furniture Co (on rem'd)*, 198 Mich App 1; 497 NW2d 514 (1993) ("a disposable, butane lighter is unquestionably a simple tool.")

In *Viscogliosi, supra*, the plaintiff claimed that the walkway was a mechanically complicated machine and, therefore, did not qualify as a simple product. The Court of Appeals disagreed holding that, ". . . case law involving complicated machinery focuses on the way the product is used rather than on its underlying mechanical parts." 208 Mich App at 189.

In *Raines, supra*, the court looked at those cases where Michigan courts found the products complex and those cases where the court determined that the product was a simple tool:

> "First, generally, complex products are very mechanized, thus eliminating the user's control over the product. Second, complex products have a tendency to require a method of operation that exposes the user or operator to injury.
>
> * * *
>
> The Michigan courts have categorized certain products as simple when one or both of the following conditions exists: (1) the products are not highly mechanized, thus allowing the users to maintain control of the products; (2) the intended use of the products does not place the users in obviously dangerous positions. For example, the courts have indicated that hammers, knives, gas stoves, axes, buzz saws, propeller driven airplanes and trampolines are all simple products and differ from complex products in the manner in which they are operated and/or in the relatively simplistic nature of their design.

Id, at 825. Applying these rules, the court found that a hand gun was a simple product. The same conclusion obtains here. The hair care oil at issue satisfies both of the alternative tests utilized to determine whether a product is simple. It is not mechanized at all. The user has the

ability to maintain control over the product. The intended use of the product does not place users in obviously dangerous positions. It is a simple product.

2. <u>What Must be Generally Recognized</u>.

In order for the open and obvious danger doctrine to apply, and to obviate a duty to provide a warning, there is no requirement that persons in general or the Plaintiff in particular, who know of a potential danger associated with the use of misuse of a product, be shown to have knowledge that death may result. That is the holding of this Court in *Glittenberg, supra*. Yet, the Court of Appeals in this case has said that there is such a requirement.

The very same argument which Plaintiff makes in this case, and which was accepted by the Court of Appeals, was made in *Glittenberg* and was rejected by this Court. The injured parties in those three consolidated cases each admitted that they knew that diving into shallow water was dangerous. *Glittenberg, supra* at p 385. They argued that while they -- and average users of ordinary intelligence -- knew of a risk of injury, they did not perceive the risk of quadriplegic injury or death[11] and, therefore, the manufacturer owed a duty to warn of those potential consequences. The argument was rejected by this Court.

This Court stated:

> "The gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized.

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[11] *Glittenberg, supra* at p 400, fn 28. The open and obvious danger doctrine and the "known to the user" doctrine are different doctrines but the analyses under them are similar. The former is an objective doctrine focusing on the common knowledge of ordinary product users. The latter is a subjective one focusing on the knowledge of the product user. A common, and dispositive issue, in our view is whether the ordinary product user (under the open and obvious danger doctrine) or the particular product user (under the "known to the user" doctrine) -- who have knowledge of a basic danger or risk involved with the use of a product -- must have knowledge of the specific degree of danger of potential injury associated with the use of the product in order for the doctrines to apply. Defendants-Appellants submit that the answer is no.

* * *

> In effect, plaintiffs seek to convert the duty to warn argument by conceding a readily apparent and generally recognized dangerous condition for which no duty exists, while claiming that because a specific consequence or degree of harm from that dangerous condition, i.e., paralysis or death, is not generally recognized, a specific warning is required.
>
> * * *
>
> . . . [W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur from the use of foreseeable misuse of the product. As the court observed in *Jamieson, supra* at 39:
>
> > [S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one . . . ."

Glittenberg, supra at pp 401-402. (Underlining supplied.)

At bottom, this Court held that in order for the open and obvious danger doctrine to apply, it is not necessary that the ordinary user understand the precise nature of every possible injury that may result from a danger that is reasonably expected to be recognized by the average user of ordinary intelligence. That rule of law has been applied by the Court of Appeals in subsequent cases and when it hasn't, this Court has not hesitated to vacate the failure to follow stated precedent.

That rule of law was not applied by the Court of Appeals in *Pigeon v Radloff*, 215 Mich App 438; 546 NW2d 655 (1996). In that case, the majority held that a jury question is posed whether a particular plaintiff realized the full extent of the risks involved, even where the danger is open and obvious. *Pigeon, supra* at pp 444-445. This Court ordered that the appellate

decision in *Pigeon* is to have no precedential force or effect. *Pigeon v Radloff*, 451 Mich 885; 549 NW2d 574 (1996).

The *Glittenberg* rule of law was been applied by the Court of Appeals in *Mallard v Hoffinger Indust, Inc*, 210 Mich App 282; 533 NW2d 1 (1995) on rem, 222 Mich App 137; 564 NW2d 74 (1997) and *Stopczynski v Woodcox*, 258 Mich App 226; 671 NW2d 119 (2003). In both cases, the Court of Appeals applied, and correctly so, the *Glittenberg* rule that it is not necessary that the ordinary or particular user understand the precise nature of every possible injury that may result from a danger that is reasonably expected to be recognized by the average user of ordinary intelligence in order for the open and obvious danger doctrine to apply.

The Court of Appeals' decision in this case fails to apply the *Glittenberg* rule of law. This aberrational decision must be reversed.

The rationale of *Glittenberg, supra*, is that there is no authority for the proposition that there exists a second prong to the open and obvious danger doctrine which would require a showing that persons in general or a plaintiff in particular had actual knowledge that serious injury such as death is probable. To adopt a requirement that persons confronting (and in this case, failing to prevent an infant from confronting) open and obvious dangers must also be aware of each and every potential consequence of their action would be to effectively extinguish the doctrine itself. The argument that the danger of ingesting hair oil is not open and obvious because people in general only know that, to use the Court of Appeals' characterization:

> ". . . ingestion of these ingredients, as contained in a hair and body care product, may make them ill and possibly result in vomiting, diarrhea and maybe having their stomach pumped . . . "

is an argument of degree and not substance.

In order for the open and obvious danger doctrine to apply, it is not necessary that the typical user of the product understand the specific risk of injury as opposed to the general danger

involved. The type of injury that may result from encountering, or failing to prevent a child from encountering, an obvious danger is legally irrelevant. This is so because the law does not impose a duty upon a manufacturer to warn of or protect from all conceivable ramifications of injuries that might occur from the use of the product. Courts from other jurisdictions have reached the same result.

The Supreme Court of Wisconsin determined that " . . . the open and obvious danger defense applies [even though] a reasonable person in the position of the plaintiff would not appreciate the gravity of the harm threatened by the open and obvious condition." *Griebler v Doughboy Recreational, Inc,* 160 Wis2d 547; 466 NW2d 897 (1991). *See also, Carr v San-Tan, Inc,* 543 NW2d 303, 306 (Iowa Ct App 1995) (The open and obvious danger doctrine ". . . does not include the requirement that a reasonable person would appreciate the gravity of the harm."); *Jamieson v Woodward & Lothrup,* 101 US App DC 32, 39; 247 F2d 23 (1957), *cert den* 356 US 855; 78 S Ct 84; 2 L Ed 2d 63 (1957), quoted with approval in *Glittenberg, supra*:

> "[S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one. . . . We have in the case at bar a detached retina, but we might have had any of an infinite number of injuries to eye, mouth, ear, nose, etc. We do not agree with, and find no authority to support, a holding either that a manufacturer must utter a general warning of danger from mishap with an article such as this rope or that he must catalog injuries possible upon such a mishap."

As noted in *Treadway v Smith & Wesson Corp*, 950 F Supp 1326, 1335 (ED Mich 1996):

> "To adopt a requirement that persons voluntarily confronting open and obvious dangers must also be subjectively aware of each and every potential consequence of their action would be to effectively extinguish the doctrine itself."

In *Brand v Mazda Motor Corp*, 978 F Supp 1382 (D Kan 1997), the Plaintiff's wife was killed in an automobile accident. Plaintiff sued the vehicle manufacturers arguing, *inter alia*, that they failed to warn her about the specific serious risks from wearing only an automatic torso belt

and not the manual lap belt. The Defendants sought summary judgment arguing that the decedent knew the safety purpose for wearing the manual lap belt and that they had no duty to warn her of the specific risks associated with failing to wear the lap belt.

In an attempt to avoid summary judgment, plaintiff argued that defendants had a duty to specifically warn of the possibility of severe liver and abdominal injuries. The court, however, deemed plaintiff's analysis "too narrow." *Brand,* 978 F Supp at 1389.

The Brand court aptly articulated the difficulties in holding manufacturers liable for failing to warn of specific injuries:

> If such were the law, not only would the actual knowledge exception rarely apply, but manufacturers would face the unreasonable and probably impossible burden of warning consumers about every conceivable injury that could result from use and misuse of its product.
>
> 978 F Supp at 1389.

In *Holowaty v McDonald's Corp*, 10 F Supp2d 1078 (D Minn 1998), the court considered and rejected a "degree of danger" argument identical to that advanced by the Plaintiff here. The court stated:

> "Plaintiffs contend defendants nevertheless had a duty to warn because the risk of injury was more severe than a reasonable consumer would anticipate. Plaintiffs thought spilled coffee would only cause reddened skin and allege that reasonable consumers anticipate only minor burns. Because the public is not aware of the possibility of severe burns, plaintiffs argue defendants had a duty to warn. In essence, plaintiffs contend that a duty to warn exists if the foreseeable risk of injury is more severe than a reasonable person would anticipate, even if the risk of a less severe injury of the same type is open and obvious.
>
> The Minnesota courts have not considered plaintiffs' argument. . . . If presented with the issue, the Court believes that the Minnesota Supreme Court would reject plaintiffs' argument. Minnesota courts have repeatedly held that there is no duty to warn of open and obvious dangers. . . . An alleged difference in the

> anticipated degree of danger does not make the risk associated with the use of the product any less obvious.
>
> The discussion in *Moss v Crosman Corp*, 136 F3d 1169 (7th Cir 1998) is instructive. In *Moss*, the parents of a child killed by a BB gun alleged that the BB gun was defective due to inadequate warnings . . . . The district court held that the BB gun was not unreasonably dangerous because the average person "is aware of the danger that a projectile fire from [a BB gun] could hit a person and cause serious injury."
>
> On appeal, the Moss plaintiffs made the same argument plaintiffs advance here. Although they agreed that the average person is aware of the potential for serious injury, the plaintiffs in *Moss* argued that the same persons were unaware that a BB gun could cause death. The Court rejected the argument because the type of injury the average consumer would anticipate and the injury that resulted were different in degree, not in kind. The Court explained: "the fact that the gun caused death rather than serious injury (*i.e.*, the loss of an eye or a flesh wound) . . . does not transform the fundamental nature of the injury."
>
> The same analysis applies to the case at bar. The average consumer understands that coffee is hot, and that it will cause burns if it comes into contact with skin. The danger of burns remains apparent, even if the degree of injury is more serious than contemplated. Because the temperature of the coffee plaintiffs purchased was no hotter than is typically served in restaurants, the Court holds that defendants did not have a duty to warn plaintiffs that the coffee could cause severe burns if spilled." 10 F Supp2d 1078, 1084-85 (D Minn 1998) (internal citations and footnotes omitted).

See also, McCroy v Coastal Mart, Inc, 207 F Supp2d 1265 (D Kan 2002) ("that plaintiffs did not appreciate the degree of potential injury is unfortunate, but does not translate into a duty to warn when the basic danger is already known.")

In this case, despite the conceded and acknowledged fact that the risk of becoming ill associated with the ingestion of the product in question was obvious to a reasonably prudent product user, the Court of Appeals has imposed a duty upon a manufacturer to warn of all conceivable ramifications that might result from the use of the product. This is not the law in

Michigan. Nor should it be.[12] The November 23, 2004 decision of the Court of Appeals must be reversed.

[12] In a world where all danger is warned against, warnings lose all meaning. *Cotton v Buckeye Gas Products Co*, 840 F2d 935 (DC Cir 1988).

ARGUMENT II

THE TRIAL COURT PROPERLY CONCLUDED THAT PLAINTIFF WAS UNABLE TO PRESENT SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT CONCERNING THE CAUSATION ELEMENT OF HER CAUSE OF ACTION BECAUSE PLAINTIFF WAS AWARE THAT THE PRODUCT WAS HARMFUL IF INGESTED.

In order to establish a *prima facie* case of negligent failure to warn in a products liability action, the plaintiff must show that (1) the defendant owed the plaintiff a duty to warn of the danger, (2) the defendant breached that duty, (3) the defendant's breach was the proximate and actual cause of the plaintiff's injury, and (4) the plaintiff suffered damages as a result. *Tasca v GTE Products*, 175 Mich App 617, 622; 438 NW2d 625 (1988); *Pettis v Nalco Chem Co*, 150 Mich App 294, 299; 388 NW 343 (1986), *lv den* 426 Mich 881 (1986); *Warner v General Motors Corp,* 137 Mich App 340, 348; 357 NW2d 689 (1984), *lv den* 422 Mich 852 (1985).

As part of a *prima facie* products liability case, a plaintiff must establish a causal connection between the claimed defect attributable to the manufacturer of the product and the injury or damage of which he complains. *Caldwell v Fox,* 394 Mich 401, 407; 231 NW2d 46 (1975); *Cova v Harley-Davidson Motor Co,* 26 Mich App 602, 609; 182 NW2d 800 (1970). Of all the elements necessary to support recovery in a tort action, causation is the most susceptible to summary determination. *Davis v Thorton,* 384 Mich 138, 145; 180 NW2d 11 (1970). The question of whether sufficient evidence has been introduced to sustain a plaintiff's claim of causation is a question of law. *Detroit Bank & Trust Co v Michigan Dep't of State Hwys,* 55 Mich App 131; 222 NW2d 59 (1974).

To establish a *prima facie* case that a manufacturer's breach of its duty to warn was a proximate cause of an injury sustained, a plaintiff must show that the product would have been

used differently and that such different use would have prevented the accident, had the proffered warnings been given. *Mascerenas v Union Carbide Corp,* 196 Mich App 240, 251; 492 NW2d 512 (1992); *Ferlito v Johnson & Johnson Products, Inc,* 771 F Supp 196, 199 (ED Mich 1991) (there was no testimony during the trial that the plaintiffs would have acted any differently if the warning had been given – the absence of such testimony is fatal to plaintiffs' case; for without it, plaintiffs have failed to prove proximate cause, one of the essential elements of their negligence claim); *Van Dike v AMF, Inc,* 146 Mich App 176, 182; 379 NW2d 412 (1986) (manufacturer of trampoline not liable for failure to use a larger warning label absent proof that the plaintiff would have taken additional precautions to avoid injury); *Allen v Owens-Corning Fiberglas Corp,* 225 Mich App 397; 571 NW2d 530 (1997). As a matter of law and logic, a plaintiff who is already aware of a product danger cannot make the required causation showing.

Other cases have examined the effect of actual awareness of product danger on the duty element[13] of a products liability action. There is no duty to warn where the claimed danger is known to the person who would have received the warning. *Groncki v Detroit Edison Co,* 453 Mich 644; 557 NW2d 289 (1996); *Vroman v Sears, Roebuck & Co,* 387 F2d 732 (6th Cir 1987). For example, in *Bullock v Gulf & Western Mfg,* 128 Mich App 316; 340 NW2d 294 (1983), the plaintiff, a punch press operator, alleged that the defendant manufacturer of the press had negligently failed to warn against the dangers associated with the use of the press. In affirming the trial court's directed verdict in favor of the defendant, the Court of Appeals stated:

> "In this case, plaintiff established by his own testimony that he was aware of the dangers associated with the point of operation of the machine he was working with and that he was aware of the dangers involved in the residual motion of the ram after the power is shut off and one is changing a punch. Plaintiff was an experienced

[13] *See* fn 17, *infra.*

> operator of the machine. There was, therefore, no duty on the party of the defendant to warn plaintiff of the dangers involved." *Id.* at 323.

See also, Bishop v Interlake, Inc, 121 Mich App 397; 328 NW2d 643 (1982) (manufacturer of book-stitching machine had no duty to warn users of the danger of putting their fingers into machines; plaintiff herself knew that if she put her finger into the machine, she would be injured) and *Koern v Pentek Corp,* 142 F3d 434 (6th Cir 1998).

These holdings are consistent with Michigan law which requires that a plaintiff support a failure to warn theory with evidence that he would have changed his behavior had the proposed warning or instruction been given. *Van Dike, supra* at 182; *Spencer v Ford Motor Co,* 141 Mich App 356, 261; 367 NW2d 393 (1985). The logic is compelling. When a party is aware of danger and nonetheless acts in a given manner, imparting to that person the same information would not alter his behavior. As a consequence, there is no duty to impart that knowledge.

The Michigan statutes have codified the open and obvious danger doctrine and the "known to the user" doctrine under the title of the "sophisticated user" doctrine. The statutory "sophisticated user" doctrine is different from, and broader than, the "sophisticated user" doctrine at common law.

MCL 600.2947(4) provides:

> "Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user."

MCL 600.2945(j) defines a "sophisticated user" as:

> "a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that

> caused the injury is not a sophisticated user. (Underlining supplied).

The "sophisticated user" doctrine at common law provided that one who supplies an [assertedly] dangerous product to another through a third person has a duty to warn the user of the product's dangerous qualities only if the supplier cannot reasonably rely on the purchaser to warn the product's ultimate user of the danger. *Tasca v GTE Products Corp,* 175 Mich App 617; 624; 438 NW2d 625 (1988). *See also Aetna v Ralph Wilson Plastics*, 202 Mich App 540, 546-548; 509 NW2d 512 (1993)*; Mascarenas v Union Carbide Corp,* 196 Mich App 240, 246-247; 492 NW2d 512 (1992)*; Kudzia v Carboloy Division of General Electric Co,* 190 Mich App 285, 288; 475 NW2d 371 (1991).

The fundamental premise of the "sophisticated user" doctrine at common law was that tort law demands more of a person of above-average intelligence or knowledge. 2 Restatement of Torts, §12, 289 (2), Comment m. At common law, the doctrine applied to experts or skilled professionals in an industry. *See,* for example, *Antcliff v State Employees Credit Union*, 414 Mich 624; 327 NW2d 814, 820 (1982). The statutory definition of a "sophisticated user" as set forth above shows that the Legislature intended to and did broaden the application of the doctrine beyond those of above-average intelligence or knowledge, i.e., experts or skilled professionals in an industry, to include persons that, by virtue of experience, are or are generally expected to be knowledgeable about a product's properties. When the product at issue is one that is commonly used, the scope of the "sophisticated user" doctrine becomes congruent with the open and obvious danger doctrine because a person that by virtue of experience is generally expected to be knowledgeable about a product's properties, MCL 600.2945(j), is equivalent to a reasonably prudent product user. MCL 600.2947(4). When the actual user of the product is knowledgeable about the product's properties, the "sophisticated user" doctrine becomes congruent with the

"known to the user" doctrine. MCL 600.2947(4). Ms. Greene was a "sophisticated user" within the meaning of MCL 600.2945(j).

In discovery in the instant matter, the only facts offered by Plaintiff in support of her allegations that any of the Defendants were negligent or breached any implied warranties with respect to the subject product were that there "was no warning about the specific dangers of the product," that "Hydro carbons destroy the lungs" and that there "was no child safety cap."[14] It is clear from her testimony that the subject product would not have been used or stored any differently if any different or additional warnings were provided.

Ms. Greene is a certified nursing assistant (Dep of Cheryce Greene, pp 41-42; **Apx, p 62.** Moreover, Ms. Greene was educated as a fingernail technician. She received a diploma in "nail technician," received a certification as a nail technician and, in fact, has been self-employed as a technician. Dep of Cheryce Greene, p 85; **Apx p 73.**

Ms. Greene claims that she kept the product at all times in a medicine cabinet where Keimer could not possibly have accessed it, and she is certain that she left it there on the date of the incident. Nicole Price, the only other individual who could have had access to it, claims that she did not remove it from the cabinet that day and would not have left it where Keimer could have reached it. They both testified that they knew it could be harmful to Keimer if he ever got into it. The law on this issue could not be any more clear. In the face of this admitted experience and knowledge, the Defendant had no duty to warn. Moreover, Plaintiff simply cannot establish a *prima facie* case on the issue of causation in the absence of evidence that some proposed warning would have altered behavior in a manner that would have prevented the injury.

[14] Plaintiff has abandoned this theory on appeal.

Plaintiff contends that the post-deposition affidavit which she submitted in an attempt to avoid summary disposition created a genuine issue of material fact. It did not—for two reasons. First, Michigan has long held that "[p]arties may not create factual disputes by merely asserting the contrary in an affidavit after giving damaging testimony [under oath]"; *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 (1991) citing *Peterfish v Frantz,* 168 Mich App 43, 54-55; 424 NW2d 25 (1988); *Barticheck v Fidelity Union Bank,* 680 F Supp 144, 147 (DNJ 1988) (a party should not be allowed to create issues of fact by submissions of an "eleventh hour" affidavit which clearly contradicts her prior sworn testimony); *Gamet v Jenks,* 38 Mich App 719, 726; 197 NW2d 160 (1972). In this case, the Plaintiff testified at deposition that she knew that the product was harmful and that it should not be ingested and that was why she kept it from her son. Her post-deposition contradictory affidavit is inadmissible to attempt to change those facts.

Secondly, and perhaps most importantly, Ms. Greene's Affidavit merely claims that she did not know the degree of danger or severity of harm that could result from ingesting the mineral oils contained in the subject product. Even assuming, for the purpose of argument only, that, while Ms. Greene was concededly aware of some danger associated with ingesting the subject product, she was not aware that serious injury could result from ingesting it, that assumed fact is legally irrelevant. The legal irrelevancy of that assumed fact has been discussed in the context of the open and obvious danger doctrine. That discussion applies with equal force here.

ARGUMENT III

IN ANY EVENT, DEFENDANTS-APPELLANTS ARE ABSOLVED OF ANY DUTY TO THE MINOR PLAINTIFF BECAUSE THE DUTY TO PROTECT HIM FELL ON AN ADULT, *I.E.*, HIS MOTHER, AND NOT ON THE PRODUCT MANUFACTURER AND IT IS NOT REASONABLY FORESEEABLE THAT AN ADULT PARENT WILL FAIL TO PROTECT HER INFANT FROM DOING THE VERY THING WHICH SHE KNOWS SHE MUST NOT LET HAPPEN.

Michigan courts have held that when a product is intended for use by adults, the manufacturer has no duty to protect against use or misuse[15] of the product by children,

[15] MCLA 600.2947 provides that unforeseeable product misuse is a complete defense to a product liability claim, and that this is an issue to be decided by the court as a matter of law.

> (2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

The Legislature also defined the term, "misuse."

> 'Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances. MCLA 600.2945(e).

It is clear that Keimer's ingestion of the subject product can only reasonably be considered to be unforeseeable product misuse. Consequently, summary disposition was mandated by the statutes.

because that duty more appropriately falls on the adult users of the product. *Adams v Perry Furniture Co (On Remand),* 198 Mich App 1; 497 NW2d 514 (1993), *lv den* 445 Mich 90(1994); *Boumelhem v Bic Corp,* 211 Mich App 175; 535 NW2d 574 (1995). In *Adams*, an unsupervised child playing with a Bic lighter ignited a mattress in the plaintiff's home, causing the death of four other children. *Id.,* at 3. Plaintiff brought suit alleging that Bic had a duty to protect against use or misuse of the lighter by children. *Id.* The Court of Appeals disagreed, stating that "the focus [in a products liability action] is the *typical* user's perception and knowledge and whether the feature that creates the danger is fully apparent . . . and anticipated by the ordinary user. *Id.,* at 13 (emphasis supplied by the court). The Court held that the danger involved with that product, that it could burn property and persons, was obvious. Moreover, the *Adams* court stated that, "We believe that the risk of danger to children is best obviated by the supervisory control of the product by its adult purchasers." *Id.,* at 14. *See also Boumelhem, supra,* at 180.

The same result obtained in *Kirk v Hanes,* 16 F3d 705 (6th Cir 1994). In *Kirk*, a three-year old child was injured when her five-year old brother set fire to her T-shirt with a Bic lighter. The district court entered summary judgment in favor of the lighter manufacturer. The Sixth Circuit affirmed the district court's judgment. The Sixth Circuit concluded "that no reasonable juror – in light of the fact that the danger of lighters is obvious to their intended users – could find that these lighters pose an unreasonable risk of harm." *Id.* (Emphasis in original). The Court simply applied the settled principle that a product is not unreasonably dangerous if the hazard it poses is apparent to the ordinary user.

Kirk, Adams, and *Boumelhem* involve the allocation of responsibility between adults and manufacturers for protecting children from the dangers inherent in everyday products that are manufactured for and sold to adult users. *Kirk, supra,* at 710. The public policy of the State of

Michigan does not support shifting responsibility for safeguarding children away from the adult purchasers and intended users and onto product manufacturers and sellers. *Id.*[16]

The Court of Appeals has, contrary to the public policy of this State,[17] shifted responsibility for safeguarding infants away from the adult intended users of products and onto the product manufacturer. The Court of Appeals' basis for doing so lacks logical consistency. The Court of Appeals reasoned that even though adults know that it is dangerous to ingest hair oil and even though adults know that they should not let infants ingest hair oil, it is, nonetheless, reasonably foreseeable that an adult parent will fail to protect her infant child from doing the very thing which she knows she must not let happen. It is not. The adult knows not to drink hair oil because the adult knows that it is dangerous to ingest. That is why the Court of Appeals held that it is not reasonably foreseeable that an adult will ingest hair oil. If the adult knows enough not to drink it himself, then the adult must know enough not to let her infant drink it. The misuse of the product by either the parent or by the child is equally not legally foreseeable.

Acts which cause injury but are foreseeable only as remote possibilities, those only slightly probable, are beyond the limit of legal liability. *Clumfoot v St. Clair Tunnel Co,* 221 Mich 113, 117; 190 NW 759 (1922)*; Trotter v Hamill Mfg Co*, 143 Mich App 593, 601; 372

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[16] In the premises liability context, the Court of Appeals has acknowledged that parents of children, and not the owners of premises where they are visiting, have a duty to supervise their own children directly. *Bradford v Feeback,* 149 Mich App 67, 70; 385 NW2d 729 (1986) (". . . as a matter of public policy, property owners should not be charged with the duty of supervising and controlling children of guests who have been invited onto the property.")

[17] "Public policy" is ". . . more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the juridical power is to determine from objective legal sources what public policy is, and not to simply assert what public policy ought to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002).

NW2d 622 (1985). The risk reasonably to be perceived defines the duty to be obeyed. *Palsgraf v Long Island RR Co,* 248 NY 339, 334; 162 NE 99, 100 (1928).

The concept of legal foreseeability is one which the courts have imposed to limit liability.[18] Remote possibilities are not foreseeable in a legal sense. One has no duty to make provision against an accident which he cannot reasonably be expected to foresee. It is not incumbent upon persons to guard against every conceivable result. The mere fact that an injury has resulted does not render the wrongdoer liable unless the injury was the natural and probable result of his actions and one which the wrongdoer ought reasonably to have foreseen might occur as a result. *Gaincott v Davis,* 281 Mich 515; 275 NW2d 229 (1937); *Jakoboski v Grand Rapids and IR Co,* 106 Mich 440; 64 NW2d 461 (1895).

Courts must place limits on foreseeability.[19] The undeniable fact is that, despite the unfortunate few accidents that occur when a parent fails to fulfill his or her responsibility to safeguard an infant and an infant ingests a product admittedly not designed to be ingested,

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[18]"Duty" and "foreseeability" are each but verbal tools used in explanatory reasoning to answer the legal question, "Should defendant pay for plaintiff's harm?" Either formulation--duty or foreseeability--is a method of describing how the law limits the circumstances or conditions under which one member of society may expect another to pay for a harm suffered. *Buchler v Oregon Corrections Div,* 853 P2d 798, 803 (Or, 1993). In Michigan, *see Skinner v Square D Co,* 445 Mich 153, 163; 516 NW2d 475 (1994).

[19] The *Restatement of Torts, § 435(2)* has limited liability for consequences which, would appear to be "highly extraordinary." Justice Talbot Smith incisively described the duty inquiry and its relationship to foreseeability:

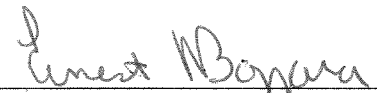
> [T]he legal problem in this case . . . involves not hindsight but foresight, the problem of duty. Was [the] action foreseeable by . . . the defendants here? Of course not . . . . Nevertheless, will we say that it was? A court can, of course, always simply hang its hat on the wall and say that anyone can foresee anything . . . . But this is purely fictional . . . . It is my opinion that a modern court, if it is to employ fictions, should state frankly that considerations of policy justifying the result ordained by the fiction." *May v Goulding,* 365 Mich 143, 155-156; 111 NW2d 862 (1961).

consumers purchase and use hair care products, such as the product at issue in this case, millions of times every year with complete safety. The mere fact that an accident does occur cannot support the legal conclusion that the accident is foreseeable in a legal sense. There is no duty to prevent careless persons from hurting themselves, *Garret v W.S. Butterfield, Theaters*, 261 Mich 262; 246 NW 57 (1933), and Defendants-Appellants contend, their children. Defendants were and are entitled to assume that adult plaintiffs will use reasonable care and take proper steps to avoid the risk of injury. *Hale v Cooper,* 271 Mich 348, 354; 261 NW 54 (1935)*; Bertrand v Alan Ford Inc,* 449 Mich 606; 537 NW2d 185 (1995). The Defendants in this case were entitled to assume that Ms. Greene would use reasonable care and take proper steps to prevent her infant from ingesting the hair care product at issue. The fact that she did not was not legally foreseeable to them.

CONCLUSION

Based on the foregoing analyses and citations to authority, Defendants-Appellants, A.P. Products, Ltd., and Revlon Consumers Products Corporation, contend that the November 23, 2004 decision of the Court of Appeals must be reversed.

PLUNKETT & COONEY, P.C.

By: 

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